IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2945 OF 2002

Elder Pharmaceuticals Ltd.& Anr. ..Petitioners

Vs.

Municipal Corporation of
Greater Mumbai & Ors. ..Respondents

Mr.Jimy Pochakhanwala a/w Mr.Anand Kumar for the petitioners

Mr.A.Y.Sakhare a/w Mr.Vinod Mahadik for the respondents

CORAM : S.U.KAMDAR, J
DATED : 4TH APRIL, 2006

ORAL JUDGMENT:

1. The present petition is filed interalia seeking a Writ of Certiorari for setting aside an order dt.26.9.02. By the said order, the respondent corporation has sought to levy Octroi Duty on an item known as 'Tantum oral rinse' under item 59 of Schedule H of the Octroi Rules. The petitioners are also seeking a refund of Octroi collected by the respondent corporation in respect of the consignment of the said goods. Some of the

material facts of the present case are as under:

2. The petitioner is a pharmaceutical company interalia manufacturing medicines and medicinal preparations. The respondents is a Municipal Corporation which has framed Octroi Rules for levy of an Octroi in respect of items which are entering within the territorial limit of City of Bombay under the provisions of Bombay Municipal Corporation Act, 1988. It is the case of the petitioners that the petitioners prepared medicinal preparation under the trade mark 'Tantum'. One of the drugs manufactured is 'Tantum oral rinse. It is the case of the petitioners that the product which is manufactured by the petitioners is a medicine and is sold in the market only on the prescription of the registered medicinal practioner only. It is also the case of the petitioners that while manufacturing the said drug the generic drug known as 'Benzydamine HCI 0.1%' is used for inflammation therapy in the oral form. The drug which is manufactured by the petitioners is used mostly for mouth inflammation following dental surgery.

3. It is the case of the petitioners that on 26.9.02 one of the consignment of drug of the petitioners on its entry in Bombay was stopped at Vashi and the respondent sought to levy Octroi @ 5.5% under item 59 of schedule H of the Octroi Rules. The consignment which was detained by the respondent was a consignment of 402 packs of 'Tantum' oral rinse. It is the case of the petitioners that after the said consignment was detained, the petitioners were made to pay Octroi of Rs.23,172/- on the said consignment and the petitioners paid the said amount under protest and were issued Receipt indicating the payment of the said amount under protest by the corporation.

4. Under the provisions of Octroi Rules the items which falls under schedule H are levied with the Octroi duty and are thus, liable to payment thereof whereas item which are falling under Schedule H-1 are free from the payment of Octroi Duty. It is the case of the petitioners that the medicines are falling under item 36 of schedule H-1. The said item 36 interalia reads as under:

> "Live saving drugs as notified by the Commissioner from time to time and medicines, excluding toothpowder, toothpaste, cosmetics, toilet requisites, soaps and confectionery used as medicines or otherwise."

. However, the respondent corporation has assessed the said goods under the residuary entry as was then existing under item 59 of schedule H. The said residuary entry has since been deleted. On the basis of the aforesaid amount of Octroi which has been assessed @ 5.5%

5. The learned counsel for the petitioners has contended that there is no dispute in the present case that the petitioners are manufacturing the said product as a medicine and it is sold in the market as a medicine. The said goods are sold only on the doctors prescription and cannot be sold by the chemist. The carton which has been produced also carries a statutory warning under the drugs Act that it should be sold only against the

prescription of the doctor.

6. Apart from the aforesaid, there is no dispute before me that the petitioners are holding manufacturing licence under Foods and Drugs Act and thus, the said item which is manufactured by petitioners is a item specified as a medicine under Food and Drugs Act. It is also not in dispute that the goods which are produced by the petitioners under the said licence are sold in the market as a medicine. The learned counsel has further contended that the corporation knowing fully well that the same are medicines and are sold in the market as medicines still has sought to classify the said item illegally as residuary item under item 59 of schedule H.

7. The learned counsel for the petitioners has relied upon the judgment of the learned single Judge of this court in the case of Proctor and Gamble India Ltd. Vs. The Municipal Corporation of Greater Bombay and Ors. reported in 2004(1) ALL MR 425 and has submitted that the burden of proving that the said goods falls under any of the entry of

Schedule 'H' to the Octroi Rules and thus, the liability to an assessment for payment of Octroi duty is on the Corporation.

8. In the present case, there is no material produced of any nature whatsoever nor even it is the case of the Corporation that this particular product falls within a particular item because the Corporation itself is seeking to assess the said item under the residuary heading of item 59 of schedule H.

9. The learned counsel for the petitioners has thereafter relied on para 4 and 5 of the said judgment and contended that once goods are produced as a drug under the licence issued by the Foods and Drugs Authorities then it is not open for the Corporation to contend that the said goods are not medicines and are liable to be assessed as residuary article under item 59 of the schedule H.

10. The learned counsel for the petitioners has also drawn my attention to the judgment of the Division Bench in Appeal no.916 of 1993 decided on

9.8.94 in which it has been interalia held once again held that the burden of proving that the item falls under particular heading of Schedule 'H' of the Octroi rules is that of the department because tax statute has to be strictly construed and in absence of discharge of the said burden, it is not open for the department to levy any tax and/or any octroi on any of the items which are brought in within the territorial limit of Bombay by the petitioners.

11. The learned counsel for the petitioners has also relied upon the Division Bench judgment to the effect that once the goods are manufactured under the Drug Licence then all such drug preparations are to be treated as medicines and thus, they are entitled to benefit of exemption under item 36 of schedule H-1 of Octroi Rules. It is therefore submitted that the impugned order passed by the authorities dt.27.9.93 is illegal, unlawful and is liable to be quashed and set aside. The plaintiffs are entitled to refund of amount wrongfully collected by the respondents towards the Octroi duty.

12. On the other hand, the learned counsel for the Corporation has pressed reliance on the averments made in affidavit in reply to the said petition and has contended that it is for the petitioners to prove that the said item falls under the category of medicine and that the petitioners have failed to discharge the said burden. It has been further submitted that in any event there is an alternate remedy available under the Octroi Rules and therefore the present petition ought not to be accepted.

13. The learned counsel for the respondents however has not been able to indicate under which entry of Schedule 'H' the said goods can be classified for the purpose of levy of Octroi Duty. The learned counsel for the respondents has fairly conceded that there is no material on record to establish that item falls under any particular heading of schedule H. He has submitted that it is because of the same that the Corporation has relied upon item 59 of schedule H.

14. I have considered the rival contentions and I am of the opinion that there is no substance in the contention of the learned counsel for the respondents.

15. Dealing with the first contention that there is an alternate remedy available of an appeal under the rules. It is now well settled that the appeal cannot be a fetter on the power of the writ court to exercise writ jurisdiction. It is only a matter of discretion. It is also well settled that the court normally at the final hearing of the writ petition, once it is admitted, would not dismiss the petition only on the ground of alternate remedy unless in the view of the court it is necessary that the party must be relegated to appeal to determine any aspect of fact. There is no such case is made out in the present case. In that view of the matter, I do not entertain the contention that the petition should be dismissed on the ground of alternate remedy.

16. Now turning to the second contention that the petitioner has failed to prove that the said

item is a medicine. I am of the view that the contention runs counter to the two judgments of this court ie. judgment of the learned single judge in the case of Procter and Gamble India Ltd. Vs. The Municipal Corporation of Greater Bombay (Supra) and the judgment of the Division Bench in the case of the Municipal Corporation of Greater Bombay and Ors. Vs. 1. Procter & Gamble India Ltd. and Anr. (supra) in which it has been held that it is for the authority who is seeking to levy the tax must discharged the burden to establish that the gods falls under any particular heading and thus liable to assessed for payment of Octroi. In that view of the matter, the submission made by the learned counsel for the respondents is required to be rejected.

17. On the aforesaid facts of the present case, it is clear that there is no material of any nature whatsoever for the respondent corporation to arrive at a conclusion that the said item is not a medicine. In my opinion, the petitioners have been able to demonstrate that the said goods are medicine not only by virtue of the fact that under

the licence issued by the Food and Drugs Authorities which has been produced in an affidavit dt.8.6.05 but also because there is a sufficient material indicating that the said goods are sold in the marked as a medicine.

18. In the light of the aforesaid, I am of the opinion, that the present petition must succeed. I therefore, make the present petition absolute in terms of prayer clause (a) and (e).